No. 182

In the Supreme Court of the United States

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, HARRY WESTON, WALTER DOWNEY, ROY UTTINGER, JAMES PIKE, TERRILL HENRY, A. J. JENKINS, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, *Appellants*,

vs.

EMPIRE STORAGE AND ICE COMPANY, a Corporation, *Appellee*.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

(Paragraph 3 of Rule 12 and Paragraph 3 of Rule 7)

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Subject Index and Specification, With Page Number, of Points and Authorities Urged and Relied Upon by Appellants.

Cases and Authorities Cited.

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I.

The status of the case is as follows:

Appeal has been allowed upon proper petition accompanied by the appropriate documents, to the Supreme Court of the United States by the Chief Justice of the Supreme Court of Missouri. Appellants have filed transcript certified by the Clerk of the Supreme Court of the State and have docketed the case. Appellee has filed in this Court its Statement in Opposition to Jurisdiction

accompanied by a Motion to Dismiss or Affirm. The Clerk is proceeding to print those portions of the record required to be printed at this time by paragraph 5 of Rule 12. Appellants are now filing this brief in opposition to appellee's statement and motion as permitted by paragraph 3 of Rule 7.

II.

STATEMENT.

(Page references.) Printing by the Clerk of the complete certified record has not been done at this time, except the Jurisdictional Statement. Hence, page references to the printed record are not now available. As to facts appearing from the Opinion, the page references are to 210 S. W. (2d) (Advance Sheets, May 18, 1948) 55.

This is an action by Empire Storage and Ice Company (appellee) against Joseph Giboney, *et al.* (Appellants), individually and as members and officers of Ice and Coal Drivers and Handlers Local Union No. 953, affiliated with American Federation of Labor, to enjoin appellants from peaceably picketing appellee's plant. Final injunction was granted by the court of first instance and affirmed by the highest court of the state. (53-59).

Appellee operates a cold storage warehouse and manufactures and sells ice to ice peddlers. Appellants are a labor union whose membership includes ice peddlers. Eighty percent of the 200 ice peddlers doing business in Kansas City are members of the union. The union engaged in a campaign for the purpose of inducing the non-union peddlers to become union peddlers and also to establish a minimum wage of $4 per day for a peddler's helper (56).

Appellants sought to induce appellee to aid it in its campaign by appellee's selling ice only to union peddlers. All ice manufacturers in Kansas City, except appellee, sold ice only to union peddlers (56). The object and purpose of the union was to increase its membership by

inducing non-union peddlers to become union peddlers and to fix a wage.

The picketing was of appellee's plant. The picketing was peaceable with no claim of violence or breach of the peace or conduct calculated to promote breach of the peace. The sole ground for the injunction and the judgment awarding the same was that the picketing was for an unlawful purpose in that it constituted an unlawful combination in restraint of trade and competition in violation of Section 8301, Revised Statutes of Missouri, 1939, which, for convenience of reference, is quoted in the note. (56). No other ground of illegality was asserted.

> "Defendants answered they had the right to picket under the freedom of speech provisions of the Federal and State Constitutions" (56).
>
> "The court (i. e., the lower court) permanently enjoined defendants from picketing plaintiff's plant" (56).

The state court construed said Section 8301 as rendering unlawful any picketing that resulted in restraint of trade or competition, however lawful such picketing otherwise might be. The court did not set up any distinction based upon the amount or character of restraint of trade; made no distinction between those cases where restraint of trade was the direct object, purpose and effect of the picketing, and those cases wherein such results were merely incidental, casual or fortuitous. As we

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NOTE:

"Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article." (Section 8301, Revised Statutes of Missouri, 1939.)

conceive it, the opinion the state court is holding is that any picketing, however otherwise lawful, becomes unlawful when it results in restraint of trade or competition; that such is the legal meaning of Section 8301; and that said Section, so construed and applied, does not deprive appellants of any constitutional rights.

III.

On the face of the record as it is now presented, the Supreme Court has unassailable jurisdiction.

On the face of the record, as now presented, the Supreme Court has undoubted jurisdiction of this appeal under Judicial Code 237(a), as amended, Title 28 U. S. C. A., Section 344(a), which provides:

> "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error (now appeal)."

The Petition for Appeal, the Judicial Statement, now printed and before the court, the Assignment of Errors and other documents certified by the Clerk of the State Court and filed herein, bring the appeal squarely within the provisions of said Section 237(a) Judicial Code.

The final decree was in the highest court of Missouri in which a decision in the suit could be had; the validity of a Missouri statute (Section 8301, Volume 18, Revised Statutes, Page 516, of the State of Missouri) as construed by the Supreme Court of Missouri, was drawn in question as being repugnant to the Constitution of the

United States and particularly Amendment One thereto; and the decision of the state court was in favor of the validity of the statute. Appellants in the court of first instance, by motion and by answer on first opportunity so to do, invoked the protection of the Constitution of the United States. Appellants throughout the litigation, by pleadings, briefs, and other proper methods, submitted and contended that if the state statute were construed to render unlawful and enjoinable the peaceable picketing here involved, then said statute was unconstitutional and void, because in violation of Amendment One. The State Supreme Court in its opinion and decision treated the constitutional question as having been properly and timely raised by appellants, but proceeded to decide such constitutional question adversely to the appellants. This, notwithstanding the proper invocation by defendants of such specific constitutional rights. The court said:

> "'Defendants answered they had the right to picket under the freedom of speech provisions of the Federal and State Constitutions'' (57).
>
> "Under these circumstances we hold the decree does not contravene defendants' right of free speech under the Federal or State Constitutions.'' (210 S. W. (2d) l. c. 58).

Hence, appellants submit that upon that part of the printed record now before the court, the case is precisely and exactly within the provision of said Section 237(a) of the Judicial Code and for that reason the Motion to Dismiss or Affirm should be overruled.

We are aware and concede that even though technically the Supreme Court has jurisdiction under said Section, yet such jurisdiction will not be exercised unless the Federal question be substantial. We are not aware how far

the court may desire to go into the question of the substantial nature of the constitutional question at this stage of the proceedings. The court, in the present status of the case, has before it only those portions of the record required to be printed under the provisions of Paragraph 5 of Rule 12. That is, the court does not now have the entire printed record. Appellee may, under Paragraph 3 of Rule 7, file its Motion to Dismiss or Affirm after the entire printed record is before the court and it would seem that the court would then be in better position to pass upon the substantial nature of the constitutional question rather than now with only a portion of the printed record before the court.

Appellants, however, in their Jurisdictional Statement, now printed and before the court, submitted, together with argument and citation of authorities, that the constitutional question was substantial and of great import. In furtherance of such submission in the Jurisdictional Statement appellants submit the following:

IV.

The constitutional question presented on this appeal is substantial and is of such nature as to require the court to hear the parties in brief and in oral argument, upon the entire record.

There Is a Labor Dispute in this Case.

The opinion by the Supreme Court of the State, and also appellee, both stress the statement, "there is no labor dispute of any kind between plaintiff and its employees," and that hence the established principles governing the rights and obligations of parties to a labor dispute do not apply. Manifestly, this is *nonsequitur*. The fundamental object, the overriding purpose, of the union was to increase its membership by inducing non-union peddlers

to become union peddlers and, by union activity, to fix a minimum wage for helpers. It sought to induce appellee to aid it in the accomplishment of such purpose by refusing to sell ice to non-union peddlers. The ice company refused. This constituted a labor dispute, notwithstanding there was no controversy between appellee and its immediate employees. It is settled that a labor dispute can exist even though none of the employees of the picketed employer are members of the picketing union. *Senn* v. *Tile Layers Union*, 301 U. S. 468, 57 S. Ct. 857; *American Federation of Labor* v. *Swing*, 312 U. S. 321, 61 S. Ct. 568; *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 42 S. Ct. 72, and other cases.

The foregoing question was squarely and specifically submitted to the Supreme Court as evidenced by the following language in the *American Federation of Labor* Case, *Supra*:

> "The decree (of the Supreme Court of Illinois) recited 'that this Court and the Supreme Court of this State have held in this case that under the law of this State, peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (i.e., where there is no approximate relation of employee and employer), and that appellants are entitled in this case to relief by injunction against the threat of such peaceful picketing or persuasion by appellees.'" (312 U. S., l. c. 324:)

The Supreme Court held directly to the contrary:

> "We are asked to sustain a decree which for the purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.
>
> "Such a ban of free communication is inconsist-

ent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 209, 42 S. Ct. 72, 78. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case." (*American Federation of Labor* v. *Swing*, 312 U. S. 321, l. c. 325, 61 S. Ct. 568, l. c. 570).

In *New Negro Alliance* v. *Sanitary Grocery Company*, 303 U. S. 552, 58 S. Ct. 703, the matter in controversy was whether the case involved or grew out of a labor dispute. The decision of the Supreme Court was in the affirmative. The Negro Alliance, doing the picketing, was a corporation composed of negroes organized for mutual improvement of its members. No member or representative thereof was, or ever had been, or desired to be, employed by the grocery company. There was no dispute or con-

troversy between the company picketed and its employees. The purpose of the picketing was to induce or compel the grocery company being picketed to employ Negro employees. The case was decided on the pleadings. The Bill of Complaint alleged that the defendants doing the picketing were unlawfully conspiring "to picket, boycott, and ruin respondent's business in its stores and particularly the store at 1936 11th Street." It was further alleged that the acts of the defendants were "unlawful, constitute a conspiracy in restraint of trade, and if continued will ruin respondent's business." This court held that the case presented a labor dispute.

V.

The Decision of the state court as to the meaning and effect of a state statute is final. But its decision as to the constitutionality of the statute, as construed by the Supreme Court of the State, is subject to review by the Supreme Court of the United States.

Appellee submits:

"It is submitted that the decision of the Supreme Court of Missouri construing and applying a statute of the State of Missouri is conclusive and is not reviewable by the Supreme Court of the United States."

It is true that the meaning, scope and legal effect of a state statute is exclusively for the state. However, the question of the constitutional validity of a state statute as construed by the state court is not exclusively for the state court. Such decision is reviewable by the Supreme Court of the United States. Appellants have not by Assignment of Error, Jurisdictional Statement, Points Relied Upon, or otherwise sought to have reviewed the correctness of the state court's decision as to the meaning of the state statute. Our submission is quite different. It

is that, accepting the decision of the state court of the meaning of the statute as final, the statute, as so construed, is void because in conflict with the Constitution of the United States.

VI.

The decision by the state court cannot be justified on the ground that freedom of speech is not an absolute right.

Appellee submits:

"The right of free speech is not absolute at all times and under all circumstances." Hence, it is contended that the abridgment of freedom of speech here involved is permissible because the right of free speech is not absolute.

Again, this is *non sequitur*. It is admitted that the constitutional right of free speech is not absolute. Nor, for that matter, is any other constitutional right, even the right of life. The sovereignty may hang a man if the ritual commonly called "due process" is religiously adhered to. The sovereignty may draft a man and send him to his death on a battlefield. If the constitutional right of life were absolute, the sovereignty could legally do neither.

Although these fundamental constitutional rights are not absolute, they may not lightly be abridged.

VII.

The doctrine of clear, present, or imminent danger to the public.

It is at this point that the doctrine of clear, present, or imminent danger to the public comes into play. No abridgment of any character can be placed upon freedom

of speech and of the press or of any other fundamental constitutional right unless there is clear, present, or imminent danger to the public if such abridgment be not made.

The doctrine of clear, present, or imminent danger to the public is applicable to freedom of speech as exemplified by peaceable picketing. *Schenck* v. *U. S.* (1919), 249 U. S. 47, 39 S. Ct. 247.

The restrictions in that case pronouncing upon abridgment upon freedom of speech have not been relaxed but have been narrowed and confined. *Bridges* v. *State of California*, 314 U. S. 252, 62 S. Ct. 190; *Herndon* v. *Lowry*, 301 U. S. 242, 57 S. Ct. 732; *Thornhill* v. *Alabama*, 310 U. S. 88; *Schneider* v. *New Jersey*, 308 U. S. 147, 60 S. Ct. 146.

> 'What finally emerges from the 'clear and present danger' cases is a working principal that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.'' (*Bridges* v. *State of California*, 314 U. S. 252.)

> '' 'Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon the freedom of speech or of the press. The evil itself must be substantial.' Brandeis J. concurred in *Whitney* v. *California, supra*, 274 U. S. 374. Legislative preferences or beliefs cannot transform minor matters of public inconvenience or annoyance into substantive evils of such weight to warrant the curtailment of liberty of expression. *Schneider* v. *State*, 308 U. S. 147, 161.'' (*Bridges* v. *State of California*, 314 U. S. 252.)

> ''The power of the state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing, even of utterances of a

defined character, must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principles of the Constitution." (*Herndon* v. *Lowry*, 301 U. S. 242.)

Clear and present danger to the public of the State of Alabama did not warrant restriction or impairment of freedom of speech evidenced by picketing in *Thornhill* v. *Alabama*, 310 U. S. 88; nor did such clear and present danger authorize the restriction upon picketing in California in *Carlson* v. *California*, 310 U. S. 106; nor did it justify restrictions upon picketing in the circumstances of *Journeymen Tailors Union* v. *Miller*, 312 U. S. 658; nor under the circumstances of *Bakery and Pastry Drivers* v. *Wohl*, 315 U. S. 769; nor did such clear and imminent danger justify impairment of freedom of speech as evidenced by picketing in the circumstances of the *Swing* and *Meadowmoor* cases.

It is noteworthy that in all of the cases, so far as we have been able to find since the *Thornhill* case that have come to the Supreme Court of the United States wherein it was claimed that clear and present danger or peril to the public justified the given restrictions or abridgment of freedom of speech and of the press as applied to peaceable picketing, the restrictions in each case have been held to be in violation of the Constitution and void.

It is therefore submitted that even though, as claimed by appellee, that freedom of speech is not absolute, yet such freedom may not be abridged unless there is clear, present or imminent danger to the public if such restraint

be not made. It is likewise submitted that upon the record in this case there was not present the danger or peril to the public justifying the abridgment here involved.

VIII.

The exact questions decided by the Missouri Supreme Court.

The Supreme Court of Missouri has in this case held:

1. That peaceable and otherwise lawful picketing becomes unlawful and enjoinable where the result thereof is lessened trade or competition.

2. That concerted action by union members in otherwise lawful picketing becomes an unlawful pool, trust, agreement, combination, confederation or understanding in restraint of trade of competition where the result of such picketing is lessened trade or competition in fact.

3. That such otherwise lawful picketing is made unlawful by the Missouri Antitrust Act (Section 8301, Vol. 18; Revised Statutes of Missouri, Annotated, as construed by the state court).

4. That such state statute so construed and applied does not deprive appellants of any right guaranteed them by the Constitution of the United States.

It is to be noted:

That the state court does not set a standard or otherwise fix the limits for determination of the amount of lessened trade or competition necessarily present before lawful picketing becomes unlawful under the Missouri Statutes.

Nor does the court make any distinction between a case where the primary and overriding purpose of the picketing is for the promotion of a lawful and legitimate union objective and where lessened trade or competition

is incidental; and the case where lessened competition and trade is the direct object and purpose of the picketing.

IX.

Peaceable picketing, by exhibition of banners, distribution of phamphlets and other literature, by word of mouth and by other means appropriate and expedient to ordinary and usual picketing by labor unions, is the exercise of freedom of speech and of the press guaranteed and protected by amendments one and fourteen to the Constitution of the United States.

It is our position that the foregoing provisions of constitutional law have been clearly, expressly and of late years uniformly decided by the Supreme Court of the United States. The leading cases are as follows: *Senn* v. *Tile Layers Union* (May 24, 1937), 301 U. S. 468, 57 S. Ct. 857, 81 Law Ed. 1229; *Thornhill* v. *Alabama* (April 22, 1940), 310 U. S. 88, 60 S. Ct. 736, 84 Law Ed. 1093; *Carlson* v. *California* (April 22, 1940), 310 U. S. 106, 60 S. Ct. 746, 84 Law Ed. 1104; *American Federation* v. *Swing* (February 10, 1941), 312 U. S. 321, 61 S. Ct. 568, 85 Law Ed. 855; *Milk Wagon Drivers Union* v. *Meadowmoor* (February 10, 1941), 312 U. S. 287, 61 S. Ct. 552, 85 Law Ed. 836, 132 A. L. R. 1022; *Bakery Drivers Union* v. *Wohl* (March 30, 1942), 315 U. S. 769, 62 S. Ct. 816, 86 Law Ed. 1178; *Carpenters Union* v. *Ritter's Cafe* (March 30, 1942), 315 U. S. 722, 62 S. Ct. 807, 86 Law Ed. 1143; *Cafeteria Union* v. *Angelos* (November 22, 1943), 320 U. S. 293, 64 S. Ct. 126.

"For the reason set forth in our opinion in *Thornhill* v. *Alabama*, *supra*, publicizing the facts of a labor dispute in a peaceful way, through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that lib-

erty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state." (*Carlson* v. *California*, 310 U. S. 106, 60 S. Ct., l. c. 749.)

"The freedom of speech and of the press which are secured by the First Amendment against abridgement by the United States are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgement by a state. The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and feasible reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evils averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of corrective error through the processes of popular government." (*Thornhill* v. *Alabama*, 310 U. S. 88, 60 S. Ct. 740-741.)

"In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague* v. *C. I. O.*, 307 U. S. 496, 59 S. Ct. 954, 83 Law Ed. 1423; *Schneider* v. *State*, 308 U. S. 147, 155, 162, 163, 60 S. Ct. 146, 151. See *Senn* v. *Tile Layers Union*, 301 U. S. 468, 478, 57 S. Ct. 857, 862, 81 Law Ed. 1229." (*Thornhill* v. *Alabama*, 310 U. S. 88, 60 S. Ct., l. c. 744.)

"More thorough study of the record and full argument have reduced the issue to this: is the constitu-

tional guarantee of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute!" (*American Federation* v. *Swing*, 312 U. S. 321, 61 S. Ct., l. c. 569.)

"Members of a union might without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." (*Senn* v. *Tile Layers Union*, 301 U. S. 468, 57 S. Ct. 857, l. c. 862.)

"The starting point is Thornhill's case. That case invoked the constitutional protection of free speech on behalf of a relatively modern means for 'publicizing without annoyance or threat of any kind the facts of a labor dispute.' 310 U. S. 100, 60 S. Ct. 743, 84 Law Ed. 1093. The whole series of cases defining the scope of free speech under the Fourteenth Amendment are facets of the same principle in that they all safeguard modes appropriate for assuring the right to utterance in different situations. Peaceful picketing is the working man's means of communication." (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 61 S. Ct., l. c. 555.)

"So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course, that does not follow: one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive." (*Bakery Drivers Union* v. *Wohl*, 315 U. S. 769, 62 S. Ct., l. c. 818.)

"The constitutional right to communicate peaceably to the public the facts of a legitimate dispute, is not lost merely because a labor dispute is involved, *Thornhill* v. *Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 Law Ed. 1093, or because the communication takes the form of picketing even when the communication does not concern a dispute between employer and those directly employed by him. *American Federation of Labor* v. *Swing*, 312 U. S. 321, 6 S. Ct. 568, 85 Law Ed. 855." (*Carpenters Union* v. *Ritter*, 62 S. Ct. 807, 315 U. S. 722.)

X.

A state may not by statute or judicial act declare peaceable and otherwise lawful picketing, unlawful and enjoinable, on the ground that an incidental effect of such picketing is or may be lessened trade or competition.

Such state action abridges freedom of speech and of press guaranteed by the Constitution of the United States.

The right of labor to organize to better wages and working conditions is a fundamental constitutional right. Peaceable picketing to aid in the accomplishment of such lawful purposes is likewise a fundamental constitutional right because, under these circumstances, peaceable picketing is an exercise of freedom of speech and of press. The Supreme Court of Missouri has in this case abridged these constitutional rights and its final judgment so doing should be reversed.

It is manifest even from the truncated record now before the court that the overriding purpose of the appellants was to increase the membership of their union by inducing non-union peddlers to become union peddlers and to better wages of assistant peddlers. These were lawful purposes. Lessened trade or competition was but an incidental effect of the economic pressure put upon the em-

ployer to aid in the accomplishment of the union's lawful objective.

This is not a case of a combination of those engaged in an industry as employers and a labor-union or unions for the primary purpose of suppressing competition and fixing prices, such as was before the court in *Allen Bradley Company* v. *Local Union No. 3*, 325 U. S. 797, 65 S. Ct. 1533, and in the case of *United Brotherhood* v. *United States*, 330 U. S. 395, 67 S. Ct. 775. Rather is this case more like the case of the *Apex Hosiery Company* v. *Leader*, 310 U. S. 469, 60 S. Ct. 982. In the *Allen Bradley Company* and *United Brotherhood* cases, *supra*, lessened competition and fixing of prices was the direct object which dominated the conduct of the confederation between employer and labor. Here, strengthening the union by increase of membership and fixing wages, i. e., the lawful purposes of the union, dominated the situation and lessened competition and fixing of prices was incidental.

> "The question remains whether the effect of the combination or conspiracy among respondents was a restraint of trade within the meaning of the Sherman Act. This is not a case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices. See *United States* v. *Brims*, 272 U. S. 549; *Local 167* v. *United States*, 291 U. S. 293. Here it is plain that combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union demands and an effect of it, in consequence of the strikers tortious acts was the prevention of the removal of petitioner's product for interstate shipment. So far as appears the delay of these shipments was not intended to have and had no effect on price of hosiery in the market, and so was in that

> respect no more a restraint forbidden by the Sherman Act than the restrictions upon competition and the course of trade held lawful in *Appalachian Coal, Inc., v. United States, supra*, because notwithstanding its effect upon the market of coal it nevertheless was not intended to and did not affect market prices." (310 U. S. 501.)

It must be borne in mind that in the *Appalachian* case the court was dealing with a situation where there was by force and violence a substantial interruption of movement of goods in interstate commerce. True, the Supreme Court was dealing with the meaning, scope and effect of the Sherman Act, but the controlling principle there involved is identical with that here involved.

It is our submission that a state may not forbid peaceable picketing for lawful purpose under the guise of legislation against pools and conspiracies in restraint of trade or competition or for fixing prices where the effect upon the commerce is but an incident of the exercise of the constitutional right of freedom of speech and of press exemplified in lawful picketing. All lawful picketing, if it be at all effective, necessarily and inherently has an incidental effect upon trade and commerce. If the state may make unlawful peaceable picketing for a lawful purpose because such picketing tends to lessen competition and restrain trade then the state may make all picketing unlawful because all picketing does have such tendency. This would be a return to the old English cases which held that the mere formation of a union by labor to better its condition and wage was a criminal conspiracy because it was in restraint of trade. 63 Corpus Juris 656, 13 American Jurisprudence 849, where the cases are collected.

The reasoning in the old English cases and this case is the same. There the mere formation of a union was held to be unlawful because it did have a tendency to restrain competition. Here the court has held that otherwise lawful picketing is unlawful because as an incidental effect thereof competition is lessened.

Of course, the old English doctrine was repudiated in England and has never been the law in the United States. With few minor exceptions the United States courts have uniformly held, and the principle is now settled beyond question, that labor does have the right to organize to improve its wages and working conditions and no court has held that the mere incidental effect of restraint of trade renders such organization and its lawful activities illegal.

XI.

It is settled that the fact that picketing, which is peaceable and otherwise lawful, causes loss of trade and other harm to the employer picketed does not cause such picketing to be unlawful.

In *Senn* v. *Tile Layers Union*, 301 U. S. 468, 57 S. Ct. 857, the court said:

> "It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. * * * It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right." (57 S. Ct. l. c. 863.)

In *Park & Tilford* v. *International Brotherhood* (California), 165 P. (2d) 891, it is said:

> "Picketing and boycotting unquestionably entail a hardship for an employer when they affect his business adversely. The adverse effect upon the employer's business that may result from the competition among workers for jobs is comparable to the adverse effect on his business that may result from his own competition with other employers. It is one of the risks of business. See *C. S. Smith Met. Market Co.* v. *Lyons*, 16 Cal. (2d) 389, 106 P. (2d) 414. 'The law * * * permits workers to organize and use their combined power in the market, thus restoring, it is thought, the equality of bargaining power upon which the benefits of competition and free enterprise rest. Accordingly, the propriety of the object of workers' concerted activity does not depend upon a judicial determination of its fairness as between workers and employers.' 4 Restatement: Torts, p. 118. In *Stillwell Theatre Inc.* v. *Kaplan*, 259 N. Y. 405, 182 N. E. 63, 65, 84 A. L. R. 6, an employer, bound by a closed shop agreement with one union, suffered great hardship when his theatres were picketed by another that sought to win over his employees. The New York Court of Appeals denied injunctive relief, declaring: 'The Court of Appeals has for many years been disposed to leave the parties to peaceful labor disputes unmolested when economic rather than legal questions were involved. The employer, if threatened in his business life by the violence of the unions or by other wrongful acts, might have the aid of the court to preserve himself from damage threatened by the recourse to unlawful means, but the right of the workman to organize to better their condition has been fully recognized. The fact that such action may result in incidental injury to the employer does not in itself constitute a justification for issuing an injunction against such acts.' See *United States* v. *Hutcheson*, 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788; *Fur Work-*

ers' Union No. 72 v. *Fur Workers' Union No. 21238*, 70 App. D. C. 122, 105 F. (2d) 1." (165 P. (2d) l. c. 896.)

XII.

Importance of the decision by the state court.

The importance of this question is transcendent particularly with reference to, but not confined to, the fundamental rights of labor. The State Supreme Court did not confine the scope of its decision to those cases in which the effect of freedom of speech upon restraint of trade or competition was direct, substantial and presented clear and present danger to the public. Included in the scope of the state decision are those cases where the effect upon trade and commerce was indirect, casual and fortuitous.

Practically every state in the Union has legislation, with remarkable similarity in language, prohibiting pools, trusts, combinations and confederations in restraint of trade and of competition. If freedom of speech, as exemplified in peaceable picketing by labor unions in a labor dispute for a lawful purpose, is to be abridged by local law on the ground that the exercise of such right results in restraint of trade and of competition, then, necessarily, the right of picketing under such circumstances is a dead letter. Particularly is this true where in a given case the effect upon trade and commerce and competition is indirect, casual or fortuitous. So especially is this true where the decision against the constitutional right is not based upon clear and present danger to the public and where such limitation is not considered or even mentioned.

It would be difficult to recall a decision upon fundamental constitutional right of freedom of speech more

important to labor and to the public than the one now presented to the Supreme Court.

Respectfully submitted,

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ADDENDA.

We are justified in our judgment, in citation of and additional quotation from, *American Steel Foundries v. Tri City Council*, 257 U. S. 184.

In the first place, the opinion of Mr. Chief Justice Taft lays down the elements that may render otherwise lawful picketing unlawful, such as violence, mass picketing, intimidation and the like. Let it be noted that in this case there is not present one element, nothing resembling any such element, specified in that case.

In the second place, the *Tri-City* case holds that they who labor have the right (so fundamentally a right of free men that it is guarded by the Constitution) to organize for their mutual benefit. And by peaceable and otherwise lawful persuasion to induce others to strike, and to withhold patronage from, and refuse to deal with an employer, against whom such persuasion is leveled, in order to gain labor's lawful object of bettered working conditions and wages. No federal or state act can take away such fundamental right.

In the third place, the case holds that where the real interest of a union is involved, the right of the members to encourage a strike, engage in persuasion and peaceable picketing is not affected by the fact that there is no controversy between the given employer and his immediate employees.

We quote (l. c. 208):

> "Is interference of a labor organization by persuasion and appeal to induce a strike against low wages under such circumstances without lawful excuse and malicious? We think not. Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the Courts. They were organized out of necessities of the

situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any courts. The strike became a lawful instrument in a lawful economic struggle or competition between an employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild."

The arguments by appellee are at war with the principles pronounced in the *Tri-City* case. If such arguments are to prevail, the *Tri-City* case must be disregarded.

A lawful strike, peaceable persuasion, lawful picketing, if it be at all successful, *must* result in lessened competition and restraint of trade. That is inevitable. If a state may prohibit lawful persuasion and peaceable picketing, on the ground that as a result thereof trade is restrained, competition is lessened, then may the state prohibit and render of no avail any picketing or persuasion or striking whatsoever.